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HOW TO AVOID THE 3 MOST COMMON LEGAL MISTAKES ENTREPRENEURS MAKE

*Legal Disclaimer: This information is provided for educational purposes only
and is not to be construed as legal advice.*

Are you feeling overwhelmed? Does the legal side of your business keep you up in the middle of the night worried you might be risking it all?

“Where do I begin in establishing a solid legal foundation for my company?”

As a business and trademark attorney supporting women in business, I hear this all the time and can assure you **YOU ARE NOT ALONE**. Below are three of the most common legal mistakes entrepreneurs make along with action you can take now to avoid making them.

MISTAKE #1

TRADEMARKS: Selecting a name for your business, products or services before conducting research to determine availability and registrability.

LAWYER SPEAK

Is there a mark already in existence that you might be infringing upon? Before establishing a business entity (discussed below), you must conduct a search to confirm availability of the name you have selected for your business. By selecting a name that is already in use in association with similar goods/services, you are likely committing trademark infringement - regardless of whether the existing mark is actually registered! A business may establish common law trademark rights merely by using the mark in commerce. After determining availability, the next consideration is strength in registrability. Does the mark have a strong likelihood of registration? There is a spectrum of strength ranging from the weakest (those that are descriptive and generic) to the strongest (fanciful misspellings and coined words). It is important to avoid selecting a name that is overly generic (Joe's Hardware) and one that is overly descriptive (Business Copy Company Inc.), as these types of names will provide very little, if

any, protection against Trademark infringement and are unlikely to receive registration.

REAL TALK

Your business and brand should be a unique reflection of you and protectable for many successful years to come. Imagine establishing a loyal following of clients and fans only to have the rug pulled out from under you in the form of a cease and desist or injunction. It's beyond painful and often proves to be an insurmountable obstacle for a business to overcome. Even if it is available, you want to be sure the name is unique enough to be registered so you can prevent against infringement by others.

TAKE ACTION NOW

The first and simplest step in this search is a general Google search of the name and similar phonetic misspellings (ie: "heart" and "hart") of the name, as a name that is similarly pronounced could cause a likelihood of confusion that would result in Trademark infringement.



PRO TIP!

After conducting a thorough Google search, visit the Federal Trademark Database and conduct a basic word mark search. Disregard marks that are "dead" and note that if a confusingly similar name appears, it may still be available to you if the goods/services are unrelated. If you do encounter a similar name relating to similar goods/services, I advise consulting with an attorney or contacting the USPTO with questions/concerns before proceeding with use of the mark.

Any knowledgeable trademark attorney will be able to assist in all of these steps, and the most important next step of securing a Trademark for your new business name!

MISTAKE #2

Conducting business before establishing a business entity.

LAWYER SPEAK

The following is a description of the several types of business entities available to business owners.

Sole Proprietorship:

If you are conducting business without having formally established a business entity, you are “de facto” operating as a Sole Proprietorship. The business and the owner are legally the same entity.

General Partnership:

A General Partnership is formed when two or more individuals engage in a business for profit. All partners are jointly and personally liable for all debts and liabilities of the partnership.

LLC:

An LLC provides the protection from your personal assets that a Sole Proprietorship or General Partnership cannot provide; personal assets are generally not exposed to the LLC’s debts and liabilities. Because the profits and losses are “passed through” to the owners, members of an LLC enjoy a single taxation and report taxes only at the individual level.

Corporation:

A Corporation is capable of issuing shares of stock, which is often a necessary prerequisite to attracting investors. Unlike an LLC, a Corporation incurs double taxation (both of the corporate profits and shareholder dividends). Corporations must also adhere to cumbersome requirements such as annual meetings and recording minutes.

In general, it is in the best interest of most small business owners to establish a Limited Liability Company. However, where the business is receiving investment funding, a C Corp would generally be most appropriate. A common misunderstanding is that an S Corp is a type of business entity, when in fact it is a tax election. While an S Corp enjoys the single taxation of an LLC, they are burdensome to maintain and require many corporate formalities (and stiff penalties where formalities are not adhered to). It is strongly advisable to speak to an accountant in analyzing whether an S Corp election is appropriate for your business. If you are uncertain as to which entity is most appropriate for your business, consult an attorney.

REAL TALK

As the bedrock of your company’s legal foundation, establishing a business entity should be your very first line of business (after selecting a unique and protectable name). Any agreement you enter into before establishing your business entity may expose you personally to liability on those agreements. This means that if you were to default on a contract, your house, your car and other valuable personal items could be in jeopardy. For this reason, I generally advise my clients against operating as a sole proprietorship or general partnership.

TAKE ACTION NOW

Consult with an attorney and accountant this week to discuss which entity would be most appropriate for your business.



PRO TIP!

Be careful not to commingle the funds of the business with your personal funds. As soon as you establish your business entity and file for a Tax ID Number (EIN), open up a business bank account and use it strictly for business purposes. If you commingle business and personal funds, you are in jeopardy of losing business entity protection.

MISTAKE #3

Relying on boilerplate contracts and templates
(or neglecting to establish contractual agreements altogether).

LAWYER SPEAK

Every vendor, customer or employee you interact with likely prompts a need for a written agreement, including any person who interacts with your website. Whenever there is an exchange of value, a written document should be put in place outlining each party's rights and obligations. These documents include (but are not limited to):

- Client Contracts;
- Vendor Agreements;
- Non-Disclosure Agreements;
- Independent Contractor Agreements;
- Commercial Lease Agreements;
- License Agreements;
- Liability Waivers; and
- Website Terms of Use & Privacy Policy;

REAL TALK

It is important to keep in mind that your business needs are unique. By relying on online document preparation companies, it is very likely important clauses related to your specific business needs may be overlooked. If you own and operate a website, it is necessary to feature a Terms of Use and Privacy Policy. In fact, some states require commercial sites to post Privacy Policies disclosing exactly how personally identifiable information is collected and maintained. Copying these documents from another site not only risks legal trouble in the form of copyright infringement, they do not relate specifically to your individual business practices.

TAKE ACTION NOW

Create a list of all circumstances where an exchange in value occurs in your business (money, barter, etc). Make an action plan for establishing a written agreement for each circumstance.



PRO TIP!

It is always a best business practice to establish a paper trail of all communications. This can easily be achieved in the form of an email. Get into the habit of following up all oral communication with an email detailing the items discussed in your conversation. It can look something like this:

Hi Jane,

As per our conversation this afternoon, xyz.

*Best,
Julie*

Still feeling overwhelmed?

I have an exciting opportunity to share with you! I would like to offer you a FREE 20 minute consultation. After completing this questionnaire, you will receive 20 minutes of laser-focused, specific and actionable legal advice. But, hurry! This offer expires in 14 days. Please enter the code: big3

Hope to chat with you soon!